In The
Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~1079~~ 15

SARA BAIRD, *Petitioner,*

v.

STATE BAR OF ARIZONA, *Respondent.*

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR SARA BAIRD

ROBERT H. ALLEN
755 First National
Bank Building
Phoenix, Arizona

JOHN P. FRANK
PAUL G. ULRICH
PETER D. BAIRD
LEVI J. SMITH
114 West Adams Street
Phoenix, Arizona

Counsel for Petitioner

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OPINION BELOW

This case arises on a writ of certiorari to the Arizona Supreme Court. The judgment of that Court, entered on January 14, 1969, is unreported and is without opinion. App. 7. The Arizona Supreme Court's judgment is evidenced by an order entered in the record denying Sara Baird's petition for admission to the State Bar of Arizona. App. 7.

JURISDICTION

The petition for writ of certiorari was docketed in this Court on February 21, 1969. This Court has jurisdiction under 28 U.S.C. § 1257(3). Jurisdiction to review demands for admission to state bar associations when federal questions are involved

is confirmed in *Konigsberg v. State Bar of California,* 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961).

QUESTION PRESENTED

May a fully qualified applicant for admission to the bar, who has identified all organizations with which she has been affiliated since becoming 16, be excluded from the practice of law solely because she refuses to answer the further question, "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?," particularly when the express purpose for that question is to inquire into her beliefs and views? The applicant's refusal to answer this question is based upon the guarantee of freedom of speech and association under the First Amendment of the United States Constitution, the self-incrimination clause of the Fifth Amendment of the United States Constitution, both as made applicable to the states by the Fourteenth Amendment of the United States Constitution, and the due process clause of that Amendment.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . ."

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

18 U.S.C. § 2385 (Supp. 1969) (the Smith Act) provides in pertinent part:

"Whoever organizes or helps or attempts to organize any

society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof —

"Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both . . . ."

ARIZ. REV. STAT. ANN. § 13-707(C) (Supp. 1969) provides in pertinent part:

"A person who knowingly or wilfully becomes or remains a member of the Communist Party of the United States, or its successors, or any of its subordinate organizations, or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona, or any of its political subdivisions, and said person had knowledge of said unlawful purpose of said Communist Party of the United States or of said subordinate or other organization, is guilty of sedition against the state."

ARIZ. S. CT. R. 28(c) (Supp. 1969) requires answers under oath to, among other questions, these:

"25. List all organizations, associations and club [sic] (other than Bar associations) of which you are or have been a member since attaining the age of 16 years.

. . . .

"27. Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?"

STATEMENT OF THE CASE

Petitioner, Sara Baird, graduated from Stanford University Law School in June, 1967. In February, 1968 she took the Arizona Bar examination, which she passed.[1] Subsequently, the

[1] The State Bar Committee on Examinations and Admissions has admitted that the only reason for its refusal to recommend her for membership in the bar is her failure to answer the question, the constitutionality of which is challenged by this brief. Petition ¶1, ¶2, Committee Response ¶2, App. 2, 4. The Committee acknowledges that if she answered the question to the Committee's satisfaction, the Committee would have no legal basis upon which to exclude her from the practice of law. Committee Memorandum at 7-8, App. 6.

State Bar Committee on Examinations and Admissions (hereinafter referred to as the "Committee"), refused to process her application further and to recommend her for admission to the Arizona State Bar Association.

The Committee's position was based solely upon the fact that petitioner declined to answer question 27 of the "Applicant's Questionnaire and Affidavit," set forth in Arizona Supreme Court Rule 28(c) (Supp. 1969). Committee Response ¶2, App. 4. Question 27 reads as follows: "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?" App. 18.

On the same "Questionnaire and Affidavit" petitioner answered question 25, which reads as follows:

> "List all organizations, associations, and club [*sic*] (other than Bar associations) of which you are or have been a member since attaining the age of 16 years." App. 18.

The Committee's express purpose in requiring an answer to question 27 was not to discover petitioner's past or present conduct but rather to assure the Committee that petitioner does not adhere to an unorthodox political belief. This was made clear by the Committee's Memorandum, filed in the court below:

> *"Unless we are to conclude that one who truly and sincerely believes in the overthrow of the United States Government by force and violence is also qualified to practice law in our Arizona courts, then an answer to this question is indeed appropriate.* The Committee again emphasizes that a mere answer of 'yes' would not lead to an automatic rejection of the application. It would lead to *an investigation and interrogation* as to *whether or not the applicant presently entertains the view* that a violent overthrow of the United States Government is something to be sought after. *If the answer to this inquiry was 'yes' then indeed we would reject the application and recommend against admission."* App. 5-6 (emphasis supplied).

"I also believe that Mrs. Baird should realize that even though she answered the question that she had at one time been a Com-

munist or had otherwise been associated with organizations not regarded as friendly to the United States Government, this would not necessarily cause us to reject her application. *We would undoubtedly want to ask her some questions as to her present beliefs* and as to other matters which would bear upon the effect such membership would have on her qualifications to practice law." App. 6 (emphasis supplied).

"The Committee would again emphasize to this Court that if the answer to question No. 27 is 'yes' *the committee will then endeavor to ascertain if Sara Baird does adhere to the view* that the overthrow of the Government of this State and of the United States by force and violence would be a desirable objective and that she *would expect* to actively support such views. *If this is the conclusion reached by the committee, it will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona.* Should the conclusion be that her membership is of a nominal character and that she does not *participate and adhere to the views* that a violent overthrow of our government is desirable, then the committee would have no legal basis for refusing to recommend her for admission. . . ." App. 6 (emphasis supplied).

Under the review procedure outlined in Arizona Supreme Court Rule 28(c) (Supp. 1969), petitioner filed a verified petition and a memorandum of points and authorities with the Arizona Supreme Court on December 20, 1968. The petition read in part as follows:

". . . to require petitioner to answer Question No. 27 as a condition to processing her application for admission to the State Bar of Arizona or as a condition to her admission to the Bar is a violation of petitioner's rights under the Constitution of the State of Arizona and under the Constitution of the United States, particularly the First Amendment, as to freedom of speech and association, the Fifth Amendment, as to self-incrimination, and the Fourteenth Amendment, as to due process of law and equal protection, both separately and as making applicable to state action the First and Fifth Amendments to the United States Constitution." App. 3.

Thereafter, an order to show cause was issued, directing the Committee to show cause ". . . why petitioner's application should

not be processed by the Committee without requiring of petitioner any further answer to Question No. 27 of Applicant's Questionnaire and Affidavit." Order to Show Cause at 1. Subsequently, the Committee filed its response, together with a memorandum of points and authorities, admitting that the refusal to answer question 27 was the reason for not processing her application or for recommending her for membership in the Bar Association, and denying that petitioner's constitutional rights were infringed by making an answer to question 27 prerequisite for permission to practice law in Arizona. Committee Response, App. 4, 5.

On January 14, 1969, oral argument was presented to the Arizona Supreme Court. Immediately thereafter, the Arizona Supreme Court entered an order, without opinion, denying the petition. The issue in the petition was whether constitutional rights had been denied. No state ground, adequate or otherwise, was raised by the Committee. The petition for certiorari was granted on April 7, 1969.[2]

SUMMARY OF ARGUMENT

The issue in this case is whether a bar applicant who has disclosed to a bar examining committee all organizations of which she was a member since age 16, must also state under oath, as a condition for admission to the Arizona bar, whether she has ever been a member of the Communist Party or any organization which advocates overthrow of the United States government

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[2] In the Court below, argument was presented by counsel for petitioner on the one side and the Committee on Examinations and Admissions on the other side. When the petition for certiorari was filed, the Committee was named and served as respondent. The Committee's response suggested that the members of the Arizona Supreme Court should themselves be the responding parties. Subsequently, and well within the 90-day period, each of the Arizona Supreme Court Justices was served and proper certification of service was filed. Under U.S. S. Ct. R. 21(6), the Clerk of this Court was asked in writing to deem the Justices as parties to this action. Thereafter, the Clerk of this Court held the petition briefly, and notified the Arizona Supreme Court of its right to respond. The Arizona Justices did not respond. Hence, the petition for certiorari was presented to this Court with the bar applicant as petitioner and the Committee as respondent.

by force or violence. The latter question, number 27, is expressly used by the bar Committee to search out the applicant's beliefs, rather than conduct. The Committee states that if the question is answered in the affirmative, "[w]e would undoubtedly want to ask her some questions as to her present beliefs. . . ." App. 6. If her "beliefs" are unacceptable, the Committee ". . . will undoubtedly refuse to recommend Sara Baird for admission to the Bar of the State of Arizona." *Id.* Petitioner declined to answer question 27 and was denied admission to the State Bar of Arizona for that reason alone by the Arizona Supreme Court.

The decision below violates petitioner's freedom of belief and thought, guaranteed by the First Amendment and historically accorded the highest protection by this Court. Since exclusion from the practice of law is punishment, *Ex parte Garland,* 4 Wall. 333, 377, 18 L. Ed. 366 (1867), and since the Committee uses question 27 to exclude applicants for their political opinions, question 27 is "frankly aimed at the suppression of dangerous ideas" and is therefore unconstitutional. *Speiser v. Randall,* 357 U.S. 513, 519, 78 S. Ct. 1332, 1338, 2 L. Ed. 2d 1460 (1958).

Question 27 is functionally a test oath — a device which historically has been used to suppress heretical opinion. Resistance to such test oaths is longstanding and recently there has been a sharp rise in judicial hostility toward various oaths and loyalty programs. *See Cramp v. Bd. of Public Instruction,* 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961); *Baggett v. Bullitt,* 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Elfbrandt v. Russell,* 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966); *Whitehill v. Elkins,* 389 U.S. 54, 88 S. Ct. 184, 19 L. Ed. 2d. 228 (1967); *Keyishian v. Bd. of Regents,* 385 U.S 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

The decision below violates the freedom of association, also guaranteed by the First Amendment. *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). The deterrent effect upon association results from disclosure itself, from the difficulty in answering the question properly under the

subtle elements of the Smith Act, and from the fact that the question's ultimate aim is to penalize political beliefs. There is no "controlling justification" or "overriding and compelling state interest" to support the imposition of question 27. *N.A.A.C.P. v. Alabama, supra* 357 U.S. at 466, 78 S. Ct. at 1174; *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 546, 83 S. Ct. 889, 894, 9 L. Ed. 2d 929 (1963).

Neither *Konigsberg v. State Bar,* 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), nor *In re Anastaplo,* 366 U.S. 82, 81 S. Ct. 978, 6 L. Ed. 2d 135 (1961), is controlling. There, bar applicants disclosed their beliefs but not their political affiliations. The majority in *Konigsberg* noted that there ". . . is no showing of an intent to penalize political beliefs." *Id.* at 54, 81 S. Ct. at 1009; *see In re Anastaplo, supra,* 366 U.S. at 95 & n.17, 81 S. Ct. at 986 & n.17. By contrast, petitioner has listed all associations since age 16 and refuses to answer a question which is candidly aimed at penalizing political belief. There is neither evidence nor rational finding of any "obstruction" in the present case. *Konigsberg* and *Anastaplo* are anomalies when compared with recent freedom of association cases and, at the very least, should be limited to cases not involving an intent to punish political opinion.

Question 27 is overly broad in scope and violates the general principles in *Elfbrandt v. Russell,* 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966). Since the question is not limited to disclosures involving specific intent to overthrow the government and active membership, the question intrudes into protected areas of association. However, the overbreadth principle should not be extended to the present case to permit a narrower formulation of the inquiry. The burdens on an applicant in answering such a question would not be lightened, the deterrent effects on belief and association would not be reduced, and sanctions would still remain to make costly the assertion of the privilege against self-incrimination.

Question 27 conflicts with due process because it lacks any

rational connection with the applicant's fitness or capacity to practice law. *Schware v. Bd. of Bar Examiners,* 353 U.S. 232, 238-39, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796 (1957). Having supplied information required under the mandate of *Konigsberg v. State Bar,* 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), and having listed all associations since age 16, no inference of bad moral character can be drawn from petitioner's refusal to answer question 27. The only conceivable nexus between the unanswered question and moral character would be an actual violation of the Smith Act membership clause. However, any determination of guilt under the Smith Act can be made only by a federal court, which has exclusive jurisdiction, and not by a state bar Committee. 18 U.S.C. § 3231; *Pennsylvania v. Nelson,* 350 U.S. 497, 76 S. Ct. 477, 100 L. Ed. 640 (1956).

Question 27 is arbitrary because it results in suppression of unpopular political beliefs and associations as a condition of admission to the bar. Such prerequisites of orthodoxy adversely affect the independence of the bar and the availability of legal counsel for unpopular causes and individuals.

Petitioner has also asserted her privilege against self-incrimination, since an applicant's possible answer to question 27 could either be directly incriminating or a link in a chain of incriminating circumstances under the Smith Act or the Arizona Sedition Act. Since the privilege protects the innocent as well as the guilty, *Ullman v. United States,* 350 U.S. 422, 427, 76 S. Ct. 497, 100 L. Ed. 511 (1956), its invocation does not hinge on what an applicant's answer to question 27 would be in actual fact. It is sufficient that a possible answer be incriminating. Since the privilege may be claimed in a bar proceeding, and since petitioner has been denied her legal career because she claimed the privilege, the decision below violates the principle of *Spevack v. Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967). *Spevack,* a disbarment case, should apply as well to admission proceedings. The prohibited penalty for asserting the privilege, the denial of means of livelihood, is the same in either context.

Petitioner should not be denied admission to the bar simply because she has asserted her Fifth Amendment right.

ARGUMENT

I. *Introduction.*

Sara Baird has met all of the requirements for admission to the State Bar of Arizona. However, she declines to answer question 27, which requires her to tell the Committee whether she has ever been ". . . a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence." According to the Arizona Supreme Court, she can be kept from practicing law for this refusal.

Question 27 orders petitioner to go beyond question 25, which asked her to list all organizations with which she has been associated since the age of 16. Question 27 requires her to make a judgment, under penalty of perjury, whether any group to which she belongs or has belonged is the Communist Party or is an organization which advocates the overthrow of the United States Government by force or violence. Perjury is a felony in Arizona. *See* ARIZ. REV. STAT. ANN. § 13-561.

The Committee's purpose in requiring an answer to question 27 is not to gather information about petitioner's associations — she has already listed these in response to question 25. The Committee in effect admits this in its response to the petition for writ of certiorari:

> "Since Petitioner admits to a full answer to Question 25, *i.e.*, a full listing of all organizations with which Petitioner has been associated since age 16, *we may lay aside any consideration of the requirement of Rule* [*sic*] *27 that Petitioner tell the Committee whether or not she has ever been a member of the Communist Party.*" Opposition Brief at 3 (emphasis supplied).

The Committee's purpose in requiring an answer to question 27 is to determine whether petitioner subscribes to unorthodox "beliefs" or "views." As stated by the Committee in its response filed with the Arizona Supreme Court, if ". . . the applicant *presently entertains the view* that a violent overthrow of the

United States Government is something to be sought after . . . *then indeed we would reject the application and recommend against admission.*" App. 5, 6 (emphasis supplied). In fact, the premise upon which an answer to question 27 is deemed "appropriate" by the Committee is that belief alone can disqualify one from practicing law: *"Unless we are to conclude* that one who truly and sincerely *believes* in the overthrow of the United States Government by force and violence is also qualified to practice law in our Arizona courts, *then* an answer to this question is indeed appropriate." App. 5 (emphasis supplied).

The Committee reaffirmed this concern with political belief in its response to the petition for writ of certiorari:

> "The question then is whether or not it is permissible for a Supreme Court character committee, charged with the responsibility of investigating the character of applicants for admission to practice law, to require an answer from an applicant as to whether or not such applicant *actively adheres to and expects to support and advance a belief* that the government of the United States should be overthrown by force and violence." Opposition Brief at 3 (emphasis supplied).

The Committee cannot so condition the right to practice law. It may not thus violate the First Amendment freedom of belief and association, the guarantee of due process and the privilege against self-incrimination. The Committee cannot use question 27, in function a traditional test oath, to make political orthodoxy a prerequisite for practicing law. Americans are entitled to practice law and the American people are entitled to lawyers without regard to whether their beliefs conform to the bar examiners' social and political attitudes.

II. *The Arizona Supreme Court Decision Violates the Freedom of Belief as Guaranteed by the First Amendment.*

A. *Question 27's Purpose is to Ascertain and Penalize Unorthodox Political Beliefs.*

This Court has held that exclusion from the practice of law is a penalty, since ". . . exclusion from any of the professions . . . can be regarded in no other light than as punishment. . . ."

Ex parte Garland, 4 Wall. 333, 377, 18 L. Ed. 366 (1867); *see also Greene v. McElroy,* 360 U.S. 474, 492, 79 S. Ct. 1400, 1411, 3 L. Ed. 2d 1377 (1959) (there is a "right to hold specific employment"); *United States v. Brown,* 381 U.S. 437, 458, 85 S. Ct. 1707, 1720, 14 L. Ed. 2d 484 (1965) ("It would be archaic to limit the definition of 'punishment' to 'retribution'."). Thus, the practice of law "is a right," *Ex parte Garland, supra* 4 Wall. 333, 379, and is "not a matter of the State's grace." *Schware v. Board of Bar Examiners,* 353 U.S. 232, 239 n.5, 77 S. Ct. 752, 756 n.5, 1 L. Ed. 2d 796 (1957).

Question 27 is an integral part of a process designed to punish or exclude bar applicants because of their unorthodox political "beliefs" and "views" or political opinions. Question 27 therefore violates the First Amendment and petitioner may validly refuse to answer such an inquiry.

Before delving into sensitive[3] political associations and into an area protected by the First Amendment by the imposition of question 27, the Committee must first have a "controlling justification," *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 466, 78 S. Ct. 1163, 1174, 2 L. Ed. 2d 1488 (1958), and an "overriding and compelling State interest," *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 546, 83 S. Ct. 889, 894, 9 L. Ed 2d 929 (1963).

The Committee states that the "controlling justification" or "overriding and compelling State interest" behind question 27 is to identify and exclude from the practice of law those who answer "yes" to question 27 and who "believe" in the overthrow of the government. The Committee's fundamental rationale or hypothesis is as follows: *"Unless we are to conclude that one who truly and sincerely believes in the overthrow of the United States Government by force and violence is also qualified to practice*

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[3] *Cf. Wieman v. Updegraff,* 344 U.S. 183, 190-91, 73 S.Ct. 215, 218, 97 L.Ed. 216 (1952) ". . . the consequences visited upon a person excluded from public employment on disloyalty grounds . . . [have] become a badge of infamy."

law in our Arizona courts, then an answer to this question is indeed appropriate." App. 5 (emphasis supplied).

In practice, question 27 is a clumsy device for seeking out these beliefs; it acts as a trigger for an "investigation and interrogation," not into illegal conduct, but rather into an applicant's political "beliefs" and "views." As the Committee states, an affirmative answer to question 27

> "*. . . would lead to an investigation and interrogation as to whether or not the applicant presently entertains the view* that a violent overthrow of the United States Government is something to be sought after. *If the answer to this inquiry was 'yes' then indeed we would reject the application and recommend against admission.*" App. 5-6 (emphasis supplied).

The rejection would be based primarily and perhaps even exclusively on the applicant's political opinions.

B. *As an Integral Part of a Plan to Disqualify Bar Applicants For Their Political Beliefs, Question 27 Violates the First Amendment.*

Statutes aimed at penalizing political beliefs violate the First Amendment. *Speiser v. Randall,* 357 U.S. 513, 519, 78 S. Ct. 1332, 1338, 2 L. Ed. 2d 1460 (1958), held the denial of a veteran's tax exemption unconstitutional mainly because "*[t]he denial is 'frankly aimed at the suppression of dangerous ideas.'*" (emphasis supplied). With the exemption dependent upon the execution of an affidavit proclaiming nonadvocacy of the government's overthrow, the ultimate burden of proof affected First Amendment freedoms by causing individuals to "steer far wider of the unlawful zone." *Id. at* 526, 78 S. Ct. at 1342. The statute ". . . purports to deal directly with speech and the expression of political ideas." *Id.* at 527, 78 S. Ct. at 1343.

In Arizona, "the practice of law is not a privilege but a right," *Application of Klahr,* 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967), an interest far more precious than the tax exemption in *Speiser.* In *Speiser,* the intention to inspect beliefs was not overtly avowed, except as it appeared on the face of the question.

Here, the Committee proclaims openly that political belief is its ultimate target.

If the applicant is placed under oath while the Committee examines his beliefs, then the threat of perjury rounds out a situation to which Justice Jackson addressed himself in *American Communications Ass'n v. Douds,* 339 U.S. 382, 437, 70 S. Ct. 674, 703, 94 L. Ed. 925 (1950):

> ". . . I know of no situation in which a citizen may incur civil or criminal liability or disability because a court infers an evil mental state where no act at all has occurred. Our trial processes are clumsy and unsatisfying for inferring cogitations which are incidental to actions, but they do not even pretend to ascertain the thought that has had no outward manifestation. *Attempts of the courts to fathom modern political meditations of an accused would be as futile and mischievous as the efforts in the infamous heresy trials of old to fathom religious beliefs.*" (concurring in part and dissenting in part) (emphasis supplied).[4]

We live in a world in which man is confined by society in countless ways. His house is built according to codes, his breakfast is subject to countless food regulations, his children go to regulated schools and his job is subject to all sorts of laws. He may be required off the street by a curfew. But in all this network of controls, there is one thing that is left to the man absolutely and totally, and that is his beliefs. His is the unfettered right to believe and think as he chooses. As stated in *Schneiderman v. United States,* 320 U.S. 118, 144, 63 S. Ct. 1333, 1346, 87 L.

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[4] It may be suggested that *American Communications Ass'n v. Douds,* 339 U.S. 382, 386, 70 S. Ct. 674, 677, 94 L. Ed. 925 (1950), permits the control of beliefs. There is a two-point reply to this assertion. First, the *Douds* majority wrote: ". . . we have here no statute which is . . . frankly aimed at the suppression of dangerous ideas. . . ." 339 U.S. at 402, 70 S.Ct. at 686. Subsequent cases expressly noted this feature in *Douds. E.g., Dennis v. United States,* 341 U.S. 494, 507, 71 S. Ct. 857, 866, 95 L. Ed. 1137 (1951); *Speiser v. Randall,* 357 U.S. 513, 527, 78 S. Ct. 1332, 1343, 2 L. Ed. 2d 1460 (1958). Second, *Douds* is described today as being "eviscerated" by *United States v. Brown,* 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965). NOTE, *Loyalty Oaths,* 77 YALE L. J. 739, 742 (1968).

Ed. 1796 (1943), "[i]f any provisions of the Constitution can be singled out as requiring unqualified attachment, they are the guarantees of the Bill of Rights and especially that of freedom of thought contained in the First Amendment." Hence, whether religious, *e.g., Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940) ("Thus the [First] Amendment embraces two concepts, — freedom to believe and freedom to act. The first is absolute. . . ."), or political, *Thomas v. Collins,* 323 U.S. 516, 531, 65 S. Ct. 315, 323, 89 L. Ed. 430 (1945) ("The First Amendment gives freedom of mind the same security as freedom of conscience."), this Court has accorded almost[5] complete protection to freedom of belief saying that the First Amendment ". . . creates a preserve where the views of the individual are made inviolate." *Schneider v. Smith,* 390 U.S. 17, 25, 88 S. Ct. 682, 687, 19 L. Ed. 2d 799 (1968).

While the protection of belief may be justified in terms of privacy,[6] constitutional protection against governmental intrusion into belief was given by the First Amendment: "The constitu-

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[5] There have been a few cases where beliefs have not been fully protected. *E.g., United States v. Schwimmer,* 279 U.S. 644, 49 S. Ct. 448, 73 L. Ed. 889 (1929) (an alien was denied citizenship because of her belief in pacifism); *Macintosh v. United States,* 283 U.S. 605, 51 S. Ct. 570, 75 L. Ed. 1302 (1931) (an alien was denied citizenship because he would not promise in advance to bear arms); *In re Summers,* 325 U.S. 561, 65 S. Ct. 1307, 89 L. Ed. 1795 (1945) (a bar applicant was denied admission because of his belief in pacifism). However, *United States v. Schwimmer,* and *Macintosh v. United States,* were overruled in *Girouard v. United States,* 328 U.S. 61, 69, 66 S. Ct. 826, 830, 90 L. Ed. 1084 (1946): "We conclude that the *Schwimmer, Macintosh* and *Bland* cases do not state the correct rule of law." Moreover, the Court expressly noted that "[r]efusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. . . ." Hence, *Girouard v. United States, supra* 328 U.S. at 64, 66 S. Ct. at 827, casts considerable doubt upon the validity of *In re Summers, supra.*

[6] *Cf. Schneiderman v. United States,* 320 U.S. 118, 136, 63 S. Ct. 1333, 1342, 87 L. Ed. 1796 (1943) (". . . under our traditions beliefs are personal. . . ."); *Griswold v. Connecticut,* 381 U.S. 479, 483, 85 S. Ct. 1678, 1681, 14 L. Ed. 2d 510 (1965).

tional fathers, fresh from a revolution, did not forge a political straitjacket for the generations to come. Instead they wrote . . . the First Amendment, guaranteeing freedom of thought. . . ." *Schneiderman v. United States,* 320 U.S. 118, 137, 63 S. Ct. 1333, 1342-43, 87 L. Ed. 1796 (1943). This was expounded eloquently in Justice Jackson's famous paragraph in *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642, 63 S. Ct. 1178, 1187, 87 L. Ed. 1628 (1943): "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

To illustrate the inalienable nature of freedom of belief, some of our most distinguished Americans have expressed and tolerated the very belief which is so abhorrent to the Committee. Abraham Lincoln said in an address to the House of Representatives on January 12, 1848: "Any people anywhere, being inclined and having the power, have the *right* to rise up, and shake off the existing government, and form a new one that suits them better. This is a most valuable, — a most sacred right — a right, which we hope and believe, is to liberate the world." I BASLER, THE COLLECTED WORKS OF ABRAHAM LINCOLN 438 (1953). Thomas Jefferson, another lawyer, took a very bold and tolerant view: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." Thomas Jefferson, First Inaugural Address, March 4, 1801; I J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 309, 310 (1897); *see* DECLARATION OF INDEPENDENCE.

This robust attitude of our nineteenth century fathers may be medicine too strong for some in the twentieth century, but surely this Court will stand with the argument of Charles E. Hughes when in 1920 he protested the refusal of the New York Assembly to seat five members of the Socialist Party: ". . . it is of the essence

of the institutions of liberty that it be recognized that guilt is personal and cannot be attributed to the holding of opinion or to mere intent in the absence of overt acts. . . ." 5 N.Y.L. Doc., No. 30, 143d Sess., p. 4 (1920).

Lawyers should be able to hold any beliefs they desire. *See In re Clifton*, 33 Idaho 614, 196 P. 670 (1921) (where disbarment was denied and it was held that a lawyer's pro-German attitude toward World War I did not prevent him from supporting or obeying the law). As a result, a person has a "right" to practice law and "can only be deprived of it for *misconduct*," consisting of "moral or professional delinquency." *Ex parte Garland*, 4 Wall. 333, 378, 379, 18 L. Ed. 366 (1867) (emphasis supplied). It cannot be deprived because of political belief. This philosophy was summed up by Robert E. Seiler, Esq., Secretary of the Missouri Board of Law Examiners:

> ". . . *I do not think that inquiry into political beliefs has any place in bar examination work.* I think that the study of law is the best training anyone can have for becoming a good American and I do not think it should be cluttered up with investigations about political beliefs and whether or not the applicant happens to agree with what a majority of the people may or may not consider at the moment to be subversive." Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480, 508 (1953) (emphasis supplied).

C. *The Requirement is in Function an Unconstitutional Test Oath.*

An oath of office is a pledge to maintain a standard of performance, an oath which embodies the duties owed by a citizen even in the absence of the oath, *Imbrie v. Marsh*, 3 N.J. 578, 592-93, 71 A.2d 352, 360 (1950), and which can be broken only by an act and not by a belief. The oath to support the Constitution of the United States, sanctioned in U.S. CONST. art. II, § 1, cl. 7 and art. VI, § 3, and in U.S. S. CT. R. 5, is the leading example of an oath of office. *See also* 31 & 32 Vict., c. 72 (1868); III THE LAW REPORTS, THE STATUTES 519 (1868) (an English oath of allegiance). The term "test oath" is applied to an oath

required as a condition of employment. In contrast to the oath of office, the "test oath" exacts avowals or disavowals of specified beliefs and associations, usually religious or political. *Imbrie v. Marsh,* 5 N.J. Super. 239, 245, 68 A.2d 761, 764 (1949), *aff'd,* 3 N.J. 578, 71 A.2d 352 (1950).

The "test oath" is an ancient device for weeding out heretical views. In the sixteenth century, Henry VIII, in his struggle for power against the Pope, required of his subjects an oath that they renounce the power of the Pope without distinguishing between the Pope's political and spiritual power. 35 Hen. 8, c. 1 (1544), III DAWSONS STATUTES OF THE REALM 956-57 (Reprinted ed. 1963). There were many variants of the test oath, each aimed at eliminating whatever persuasions were considered to be dangerous and heretical at the time.[7] The penalties for refusal to take such an oath could be not merely exclusion from office, but death. Koenigsberg & Starvis, *Test Oaths: Henry VIII to the American Bar Association,* 11 LAW. GUILD REV. 111, 114 (1951).

Resistance to test oaths is not some contemporary afterthought. As is legendary, Thomas More resisted an oath prescribed by Henry VIII. BOLT, A MAN FOR ALL SEASONS (1960). Repulsion toward test oaths is at the very root of the existence of our Constitution, for it was the desire to escape such oath-taking that drove many of the settlers who founded this country to its shores.

Question 27 is functionally a test oath. The applicant for bar

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[7] 28 Hen. 8, c. 7, 10 (1536), III DAWSONS STATUTES OF THE REALM 661, 663-64 (Reprinted ed. 1963); 5 Eliz., c. 1 (1563), IV DAWSONS STATUTES OF THE REALM pt. 1, 403 (Reprinted ed. 1963); 3 Jac. 1, c. 4 (1606), IV DAWSONS STATUTES OF THE REALM pt. 2, 1074 (Reprinted ed. 1963); 14 Car. 2, c. 4 (1662), V DAWSONS STATUTES OF THE REALM 365 (Reprinted ed. 1963); 25 Car. 2, c. 2 (1672), which invokes 3 Jac. 1, c. 4 (1605), V DAWSONS STATUTES OF THE REALM 782 (Reprinted ed. 1963). For discussion of test oaths, *see generally* dissenting opinion of Mr. Justice Black in *American Communications Ass'n v. Douds,* 339 U.S. 382, 447-48, 70 S. Ct. 674, 708-09, 94 L. Ed. 925 (1950); Koenigsberg & Starvis, *Test Oaths: Henry VIII to the American Bar Association,* 11 LAW. GUILD REV. 111 (1951).

admission is required as a condition to practicing law to answer, under oath, whether she has ever been a member of the Communist Party or any other organization that advocates overthrow of the United States Government by force or violence. She is thus required to take an oath concerning what the organizations with which she has been affiliated actually advocate. The oath involves no promise of future performance; it is an inquiry initially into unorthodox association. By express declaration of the Committee, this question may be augmented by interrogation into her personal beliefs. If petitioner states that she has been a member of organizations which expound heretical views and if she expresses, during the promised inquiry, political opinions which are unacceptable to the Committee, then she will be denied the right to practice law.

Contemporary test oaths, the so-called "loyalty oaths," are usually conditions of employment. An early instance of judicial antipathy toward this kind of oath was *Ex parte Garland*, 4 Wall. 333, 18 L. Ed. 366 (1867). In recent times, loyalty oaths have been treated with renewed hostility. Starting with *Wieman v. Updegraff*, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952), which demanded knowing membership, subsequent cases have invalidated various loyalty oaths and loyalty programs at an increased tempo. *See Cramp v. Board of Pub. Inst.*, 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961); *Baggett v. Bullitt*, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Elfbrandt v. Russell*, 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966); *Whitehill v. Elkins*, 389 U.S. 54, 88 S. Ct. 184, 19 L. Ed. 2d 228 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). These cases which follow the over-breadth and vagueness tests are variant in their individual applications but unmistakable in their overall trend — the unacceptability of test oaths. *See generally* NOTE, *Loyalty Oaths*, 77 YALE L. J. 739 (1968). Question 27 is equally unacceptable.

III. *The Question Violates Petitioner's Freedom of Association, Protected by the First Amendment.*

A. In Light of the First Amendment, the Question Puts an Unconstitutional Burden on the Applicant.

To answer question 27, the applicant must state under penalty of perjury whether any of the named organizations listed in response to question 25 is ". . . the Communist Party or any organization that advocates the overthrow of the United States Government by force or violence." This is no easy task even for a law school graduate since Smith Act offenses involve "subtler elements than are present in most other crimes. . . ." *Scales v. United States,* 367 U.S. 203, 232, 81 S. Ct. 1469, 1487, 6 L. Ed. 2d 82 (1961).

Apart from Fifth Amendment considerations, the applicant must determine whether any of the named organizations presently engages in proscribed advocacy, even though he may have left the organization years ago. *Noto v. United States,* 367 U.S. 290, 298, 81 S. Ct. 1517, 1521, 6 L. Ed. 2d 836 (1961) (". . . it is *present* advocacy, and not an intent to advocate in the future or a conspiracy to advocate in the future once a groundwork has been laid, which is an element of the crime under the membership clause.").

In light of *Schware v. Board of Bar Examiners,* 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957), which said that past membership alone is not bad moral character, and *Elfbrandt v. Russell,* 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966), which held generally that loyalty enforcement statutes could not apply to mere knowing membership, the applicant might conclude that question 27 only asks for violations of the Smith Act membership clause. If so, the applicant must also decide: (1) Whether the applicant became or remained a member of such an organization "knowing the purposes thereof. . . ." 18 U.S.C. § 2385 (Supp. 1969). (2) Whether the applicant was an "active" member of such a group. *Scales v. United States,* 367 U.S. 203, 222, 81 S. Ct. 1469, 1482, 6 L. Ed. 2d 82 (1961).

(3) Whether the applicant had "specific intent" to accomplish the organization's illegal aims by resort to violence. *Id.* at 221, 229, 81 S. Ct. at 1482, 1486.

Imposing this burden of difficult judgments upon individuals in this Smith Act or loyalty area violates the First Amendment. *Speiser v. Randall,* 357 U.S. 513, 526, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460 (1958). Although concentrating mainly upon the burden of proof and persuasion, *Speiser* recognized the inherent difficulties when the individual rather than the state is called upon to deal with the substantive principles in the area of loyalty:

> "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. *This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. Dennis v. United States, supra, provide but shifting sands on which the litigant must maintain his position.*" 357 U.S. at 526, 78 S. Ct. at 1342 (emphasis supplied).

The possible penalty for mistaken judgment when answering question 27 is a perjury charge and perhaps exclusion from the practice as well. Even though the perjury charge would be unfounded because the mistake would lack intent, the problem is not thereby washed away. As stated by this Court in a First Amendment case involving vagueness,

> "It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful perjury prosecution for some of the activities seemingly embraced within the sweeping statutory definitions."
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> *"Even if it can be said that a conviction for falsely taking this oath would not be sustained, the possibility of prosecution cannot be gainsaid.* The State may not require one to choose between subscribing to an unduly vague and broad oath, thereby incurring the likelihood of prosecution, and conscientiously refusing to take the oath with the consequent loss of employment, and perhaps profession, particularly where 'free dissemination of ideas may be the loser.'" *Baggett v. Bullitt,* 377

U.S. 360, 373, 374, 84 S. Ct. 1316, 1323, 1324, 12 L. Ed. 2d 377 (1964) (emphasis supplied).

B. *There is No Controlling or Compelling State Interest to Justify the Imposition of Question 27 Upon Petitioner.*

Freedom of association is protected by the First Amendment. As this Court said in *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 460, 78 S. Ct. 1163, 1171, 2 L. Ed. 2d 1488 (1958), ". . . freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." And freedom of association has long been a part of American life.[8]

This Court has repeatedly observed that ". . . compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on freedom of association . . ." since "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462, 78 S. Ct. at 1171, 1172; *Bates v. Little Rock,* 361 U.S. 516, 527, 80 S. Ct. 412, 419, 4 L. Ed. 2d 480 (1960) (". . . the deterrence of free association which compulsory disclosure of the membership lists would cause."); *Shelton v. Tucker,* 364 U.S. 479, 485-86, 81 S. Ct. 247, 251, 5 L. Ed. 2d 231 (1960) ("... to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association. . . .").

In deciding whether disclosure may be compelled, the prevailing approach has been to weigh the interests involved in each individual case: "[w]here First Amendment rights are asserted to bar governmental interrogation resolution of the issue always

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[8] As De Tocqueville observed, "[t]he right of association was imported from England, and it has always existed in America; the exercise of this privilege is now incorporated with the manners and customs of the people. At the present time, the liberty of association has become a necessary guaranty against the tyranny of the majority" and "[t]he right of association therefore appears to me almost as inalienable in its nature at the right of personal liberty." DE TOCQUEVILLE, DEMOCRACY IN AMERICA 97, 98 (Mentor ed. 1956).

involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." *Barenblatt v. United States,* 360 U.S. 109, 126, 79 S. Ct. 1081, 1093, 3 L. Ed. 2d 1115 (1959).

Before the individual's interest is outweighed and before the state may require disclosure, the state's interest or purpose for the inquiry must be very substantial indeed. For example, compelled disclosure of membership lists in *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 466, 78 S. Ct. 1163, 1174, 2 L. Ed. 2d 1488 (1958), was denied because ". . . Alabama has fallen short of showing a *controlling justification* for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." (emphasis supplied). The same was true in *Bates v. Little Rock,* 316 U.S. 516, 527, 80 S. Ct. 412, 419, 4 L. Ed. 2d 480 (1960). Later, in *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 546, 83 S. Ct. 889, 894, 9 L. Ed. 2d 929 (1963), the criteria became even more demanding of the state as disclosure of memberships was prohibited because there was no ". . . *overriding and compelling state interest.*" (emphasis supplied); *see also Williams v. Rhodes,* 393 U.S. 23, 89 S. Ct. 5, 11, 21 L. Ed. 2d 24 (1968) ("compelling interest").[9]

The interest of petitioner is the protection of her First Amendment rights. Having listed each organizational membership since age 16, petitioner is at least entitled to draw the line on a question which imposes significant burdens on the applicant and which is aimed ultimately at penalizing political belief.

Wholly apart from whether question 27 actually accomplishes its objective, the purpose for question 27 is neither "controlling" nor "compelling" and must be outweighed by the interests of petitioner. Question 27's purpose comes nowhere near the kinds of interests which have outweighed First Amendment considerations in the past. *E.g., Barenblatt v. United States,* 360 U.S. 109,

[9] One would think that the compelling interest of the state would be to uphold the First Amendment to the Constitution!

127-28, 79 S. Ct. 1081, 1093, 3 L. Ed. 2d 1115 (1959) ("self-preservation"); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 93-94, 81 S. Ct. 1357, 1409, 6 L. Ed 2d 625 (1961) (national protection against world-wide, foreign-controlled, totalitarian threat); *Wilkinson v. United States*, 365 U.S. 399, 402, 81 S. Ct. 567, 569, 5 L. Ed. 2d 633 (1961) (subversive infiltration and propaganda in the South).

C. *The Konigsberg and Anastaplo Cases Do Not Control and Warrant Review In Light of Recent Decisions.*

1. *Neither Konigsberg nor Anastaplo is applicable.*

The absence of any substantial or even legitimate purpose for question 27 can be shown by comparing the case at hand with *Konigsberg v. State Bar*, 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), and *In re Anastaplo*, 366 U.S. 82, 81 S. Ct. 978, 6 L. Ed. 2d 135 (1961). Both of these cases held in favor of the respective bar examining committees, both weighed the competing interests involved, both permitted inquiries into associations and both found the bar applicants to have obstructed the screening process. However, the state interest was much stronger in *Konigsberg* and *Anastaplo* than in the present case.

Factually, the instant case is almost the converse of *Konigsberg* and *Anastaplo*. In *Konigsberg* and *Anastaplo*, both applicants disclosed their "beliefs," *Konigsberg v. State Bar, supra* 366 U.S. at 39, 81 S. Ct. at 1000; *In re Anastaplo, supra* 366 U.S. at 85, 81 S. Ct. at 981, but declined to answer questions regarding their political affiliations: Konigsberg refused ". . . to answer any questions relating to his [possible] membership in the Communist Party," *Konigsberg v. State Bar, supra* 366 U.S. at 39, 81 S. Ct. at 1000, and Anastaplo steadfastly ". . . refused . . . to answer whether he was a member of the Communist Party or of any other group named in the Attorney General's list of 'subversive' organizations. . . ." *In re Anastaplo, supra* 366 U.S. at 86 n.7, 81 S. Ct. at 981 n.7.

Petitioner in the present case has done almost the reverse. She

has listed each and every association since age 16 and yet she refuses to answer a question which is aimed at ascertaining and ultimately penalizing political belief.

The present case is even more sharply set apart from *Konigsberg* and *Anastaplo* by the Committee's candid admission that question 27 is intended to disqualify applicants because of their political opinions. By contrast, there was no intent to penalize political belief in either *Konigsberg* or *Anastaplo*. In distinguishing *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), the majority in *Konigsberg* wrote that "[i]t would be a sufficient answer to any suggestion of the applicability of that holding to the present proceeding to observe that *Speiser* was *explicitly limited so as not to reach cases where, as here, there is no showing of an intent to penalize political beliefs.*" 366 U.S. at 54, 81 S. Ct. at 1009 (emphasis supplied). And in *In re Anastaplo, supra*, the majority was not sanctioning an exclusion based on the applicant's views: ". . . there is nothing in the record which would justify our holding that the State has invoked its exclusionary refusal-to-answer rule as a mask for its disapproval of petitioner's notions on the right to overthrow tyrannical government." 366 U.S. at 95 & n.17, 81 S. Ct. at 986 & n.17.

Furthermore, there has been no obstruction in the present case. Petitioner has answered question 25 and has named all of her memberships since age 16 to the best of her ability. Hence, there are no "gaps" to fill[10] and the "investigatory record" is not left in "sufficient uncertainty," as was the case in *Konigsberg v. State Bar, supra* 366 U.S. at 45, 46, 81 S. Ct. at 1003, 1004. The Com-

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[10] An answer to question 27 could furnish the Committee with names of organizations not previously given because question 25 requests information only about memberships occurring *after* an applicant becomes 16. However, the importance of preadolescent memberships must surely either be stale, *DeGregory v. Attorney Gen. of N.H.*, 383 U.S. 825, 829, 86 S. Ct. 1148, 1151, 16 L. Ed. 2d 292 (1966), or be without any "rational connection" to petitioner's qualifications as a lawyer. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796 (1957).

mittee simply has asserted or perhaps even assumed that there was obstruction: "As to the claim that the refusal of Petitioner to answer question 27 did not obstruct the work of the Committee, the answer is simply that the record is clear that it did." Opposition Brief to Petition for Certiorari at 4. The Committee has made no finding of obstruction or even explained how petitioner has thwarted legitimate inquiry. *See Wood v. Georgia,* 370 U.S. 375, 386-89, 82 S. Ct. 1364, 1371-72, 8 L. Ed. 2d 569 (1962) (wherein specific findings of fact were required to support a ruling against First Amendment freedoms); *see also Schware v. Board of Bar Examiners,* 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796 (1957) (". . . officers of a State cannot exclude an applicant when there is no basis for their finding. . . .").

The *Konigsberg* mandate to avoid "obstruction" cannot be so broad as to force bar applicants to abandon their right to resist questions which are posed for impermissible purposes and which have detrimental First Amendment effects. In the legislative investigation area where "[i]t is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action," *Watkins v. United States,* 354 U.S. 178, 187, 188, 77 S. Ct. 1173, 1179, 1 L. Ed. 2d 1273 (1957), indicated that there was a boundary on this duty where "political belief and association" are abridged. The same type of limit must be placed on bar committee inquiries.

2. *The doubtful validity of the Konigsberg and Anastaplo cases.*

Konigsberg and *Anastaplo* are anomalies when compared with preceding as well as succeeding decisions on freedom of association. Although citing both *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958), and *Bates v. Little Rock,* 361 U.S. 516, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960), although recognizing it was in the compulsory disclosure area, and although "weighing . . . the respective interests involved," this Court in *Konigsberg* departed from these cited decisions and employed a considerably less stringent formula in measuring

the state interest necessary to outweigh that of the individual. *Konigsberg v. State Bar,* 366 U.S. 36, 51, 52, 81 S. Ct. 997, 1007, 1007-08, 6 L. Ed. 2d 105 (1961). Instead of demanding that the state come forward with a "controlling justification" for compulsory disclosure as in *N.A.A.C.P. v. Alabama, supra* 357 U.S. at 466, 78 S. Ct. at 1174, and *Bates v. Little Rock, supra* 361 U.S. at 527, 80 S. Ct. at 419, this Court in *Konigsberg* ruled for the state whose interest simply outweighed that of the individual. The closest the Court in *Konigsberg* came to following its own formula was to note that the state's interest was ". . . clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented." 366 U.S. at 52, 81 S. Ct. at 1008. But "clearly sufficient" appears to be a far cry from "controlling justification."

Konigsberg and *Anastaplo* appear even more anomalous in light of the later cases, which have accorded the First Amendment right of association significantly greater degrees of protection. For example, the "balancing" test used in *Konigsberg* and *Anastaplo* has changed markedly. Instead of a "controlling justification," as required in both *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 466, 78 S. Ct. 1163, 1174, 2 L. Ed. 1488 (1958), and *Bates v. Little Rock,* 361 U.S. 516, 527, 80 S. Ct. 412, 419, 4 L. Ed. 2d 480 (1960), the state must now show an "overriding and compelling state interest" before encroachment upon freedom of association is permitted. *Gibson v. Florida Legislative Investigation Comm.,* 372 U.S. 539, 546, 83 S. Ct. 889, 894, 9 L. Ed. 2d 929 (1963); *see also Williams v. Rhodes,* 393 U.S. 23, 89 S. Ct. 5, 11, 21 L. Ed. 2d 24 (1968).

The doctrine of "overbreadth" has been used to expand freedom of association. *E.g., Elfbrandt v. Russell,* 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966); *United States v. Robel,* 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967); *Keyishian v. Bd. of Regents,* 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967). Cases decided under the principle of "vagueness"

similarly reflect this expansion of First Amendment rights. *Baggett v. Bullitt,* 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964); *Whitehill v. Elkins,* 389 U.S. 54, 88 S. Ct. 184, 19 L. Ed. 2d 288 (1967). This Court has also applied the Bill of Attainder clause to accord association greater protection in *United States v. Brown,* 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965), and it has strictly construed congressional grants of power to the same effect. *Schneider v. Smith* 390 U.S. 17, 88 S. Ct. 682, 19 L. Ed. 2d 799 (1968) (where a seaman was granted the right to resist interrogatories similar to question 27 and still remain eligible for an upgraded maritime position).

In short, *Konigsberg* and *Anastaplo* cases warrant review, clarification, delimiting, and perhaps even overruling in light of the trend since 1961. But they are in any case distinguishable here.

D. *Question 27 Interferes with Freedom of Association Because it Probes Into Protected as Well as Unprotected Areas of Association.*

1. *The violation of the overbreadth principle.*

Question 27 asks whether an applicant is now or has ever been ". . . a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence." Membership alone is the immediate subject of question 27 and this is not a crime. *See* 18 U.S.C. § 2385 (Supp. 1969) (the Smith Act); *Scales v. United States,* 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 82 (1961); *Noto v. United States,* 367 U.S. 290, 81 S. Ct. 1517, 6 L. Ed. 2d 836 (1961).

Lacking any reference to specific intent or active membership, question 27 violates the principle of *Elfbrandt v. Russell,* 384 U.S. 11, 13, 86 S. Ct. 1238, 1239, 16 L. Ed. 2d 321 (1966), which involved a loyalty oath required of teachers and a statutory gloss

> ". . . subjecting to a prosecution for perjury and for discharge from public office anyone who took the oath and who 'knowingly and wilfully becomes or remains a member of the

> communist party of the United States or its successors or any of its subordinate organizations' or 'any other organization' having for 'one of its purposes' the overthrow of the government of Arizona or any of its political subdivisions where the employee had knowledge of the unlawful purpose." (Quoting from the statute).

The oath and the gloss were held to threaten "the cherished freedom of association protected by the First Amendment," *id.* at 18, 86 S. Ct. at 1241, because they applied to "membership without the 'specific intent' to further the illegal aims of the organization. . . ." *Id.* at 19, 86 S. Ct. at 1242.

This Court concluded that "[t]hose who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees." *Id.* at 17, 86 S. Ct. at 1241.[11] In terms of methodology, the decision drew heavily upon *Scales v. United States, supra,* and *Noto v. United States, supra,* noted the necessity of an individual's being an "active" member with "specific intent," and recognized "protected freedoms" which apparently lie outside the zone of criminal membership prohibited by the Smith Act. *Elfbrandt v. Russell, supra* 384 U.S. at 15, 19, 86 S. Ct. at 1240, 1242.

The point seems to be that a state cannot penalize association unless that association was actually "criminal" under the Smith Act. Apparently, all of the elements of a Smith Act membership clause offense must be present before any other criminal sanction may be involved. A similar point was made in *United*

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[11] Perhaps as a justification for its preoccupation with beliefs and views, the Committee states that "[t]he basic reasoning behind the Committee's action in this matter is that of meeting the test proposed by Justice Douglas in *Elfbrandt v. Russell. . . .*" Committee Memorandum at 6. However, while recognizing the existence of *Elfbrandt* and its requirement of specific intent and active membership, the Committee promises to reject an applicant for much less than specific intent and active membership. The Committee promises rejection based simply upon a "yes" answer to question 27 and a sincere belief in the overthrow of the government without regard to time, place, circumstance, or specific intent.

States v. Robel, 389 U.S. 258, 262, 88 S. Ct. 419, 423, 19 L. Ed. 2d 508 (1967) (". . . that statute [which] sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership, runs afoul of the First Amendment."). *See also Aptheker v. Secretary of State,* 378 U.S. 500, 510, 84 S. Ct. 1659, 1666, 12 L. Ed. 2d 992 (1964).

The basic *Elfbrandt* principle has now been extended from the area of governmental regulation and prosecution to those situations involving inquiries and disclaimers. Several cases have held that inquiries and disclaimers, which pertain to an individual's assocations, cannot be allowed unless they are narrowly framed to relate only to memberships accompanied by specific intent.[12] *See Gilmore v. James,* 274 F. Supp. 75, 92 (N.D. Tex. 1967); *Reed v. Gardner,* 261 F. Supp. 87 (C.D. Cal. 1966); *Law Students' Civil Rights Research Council v. Wadmond,* 37 U.S.L.W. 1135, 2490, 2491 (S.D.N.Y. 1969).

On the basis of these cases, question 27 would be unconstitutional because it clearly probes into memberships which could be innocent under the Smith Act. A bar applicant must respond to question 27 even though he had no specific intent and he was not an active member.

2. *The overbreadth principle of Elfbrandt should not be applied to question 27.*

The overbreadth principle should not be made the ground for a decision in this case. From the bar applicant's standpoint, narrowly drawn questions, including all of the elements of a Smith Act membership clause conviction, are also unsatisfactory for two broad reasons. First, such a question would not lighten the applicant's burden in making the difficult judgments about the

[12] This may be due in part to *Wieman v. Updegraff,* 344 U.S. 183, 191, 73 S. Ct. 215, 219, 97 L. Ed. 216 (1952), which, on due process grounds, struck down a disclaimer for not distinguishing between knowing and unknowing membership: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

applicability of the subtle standards of the Smith Act. The perjury charge would still exist for a miscalculation and there would still be a definite deterrent impact upon freedom of association.

Secondly, the Fifth Amendment problems would only be intensified: if the inquiry contained all of the Smith Act elements, then a "yes" answer would provide all the proof needed for conviction. In short, the question would give the individual the burden of proving guilt or innocence. Such a situation was condemned in *Speiser v. Randall,* 357 U.S. 513, 526, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460 (1958): "Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case *that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.*" (emphasis supplied).

IV. *The Arizona Supreme Court Decision Violates Due Process.*

A. *Due Process Requires That Any Qualification For The Practice of Law Must Have A Rational Connection With The Applicant's Fitness or Capacity to Practice Law.*

Given the rule that "[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment," this Court has held that "any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-39, 77 S. Ct. 752, 756, 1 L. Ed. 2d 796 (1957); *accord, Application of Levine,* 97 Ariz. 88, 91, 397 P.2d 205, 206-07 (1964). In a practical sense, this rule is attributable to the importance of one's right to an occupation in general, *Greene v. McElroy,* 360 U.S. 474, 492, 79 S. Ct. 1400, 1411, 3 L. Ed. 2d 1377 (1959) (". . . the right . . . to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."), and one's right to

practice law in particular. *Ex parte Garland,* 4 Wall. 333, 379, 18 L. Ed. 336 (1867); *Application of Klahr,* 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967) (". . . the practice of law is not a privilege but a right. . . .").

The standards for practicing law in Arizona are general and vague. The only possible criterion relevant to this case and contained in Arizona Supreme Court Rule 28(c)(IV)(4) is the requirement that the applicant be "of good moral character." *See Application of Klahr,* 102 Ariz. 529, 531, 433 P.2d 977, 979 (1967) (". . . the practice of law is . . . conditioned solely on the requirement that a person have the necessary mental, physical and moral qualifications.").

Neither question 27 nor any answer to it has any legitimate bearing on petitioner's moral character or on her fitness and capacity to practice law. Good moral character and commitment to the Constitution are clearly evident in this case. Petitioner has complied with the mandate of *Konigsberg v. State Bar,* 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), and has cooperated with the Committee by listing every organization to which she has belonged since age 16.

In Arizona, "[u]pon admission to the state bar, the applicant . . . shall, in open court, take and subscribe an oath to support the constitution of the United States and the laws of the state of Arizona. . . ." ARIZ. REV. STAT. ANN. § 32-213(B). To answer question 27, which poses serious constitutional issues, would be inconsistent with the obligation to "support the Constitution of the United States." Petitioner could not, in good conscience, swear to "support the Constitution of the United States" and at the same time comply with an unconstitutional intrusion into her rights and into the rights of other applicants.

B. *Exclusions From the Bar For Smith Act Membership Clause Violations Should Occur Only After a Federal Court Has Rendered a Conviction.*

Question 27 asks for membership in organizations which advocate the "overthrow of the *United States Government* by force

or violence." (emphasis supplied). Restricted to the United States Government, question 27 was undoubtedly posed to ascertain whether the bar applicant has violated the membership clause of the Smith Act, 18 U.S.C. § 2385 (Supp. 1969).[13]

Nothing short of an actual violation of the Smith Act could possibly support the inference of bad moral character and an ensuing exclusion. Membership alone is insufficient. *Cf. Schware v. Board of Bar Examiners,* 353 U.S. 232, 246, 77 S. Ct. 752, 760, 1 L. Ed. 2d 796 (1957) (". . . membership in the Communist Party does not justify an inference that he [*i.e.,* a bar applicant] presently has bad moral character."). After all, membership alone is not a crime. *See Scales v. United States,* 367 U.S. 203, 222, 81 S. Ct. 1469, 1482-83, 6 L. Ed. 2d 82 (1961).

An actual violation of the Smith Act membership clause should be determined by a federal court rather than by a bar committee. Since the Committee would have to find a violation before exclusion is permitted, since the exclusion from the practice of law is "punishment," *Ex parte Garland,* 4 Wall. 333, 377, 18 L. Ed. 366 (1867), and since the exclusion of lawyers from practice is the exercise of "judicial power," *id.* at 379, only a federal court is properly constituted to decide issues of guilt and punishment under federal law.

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[13] The question also asked for membership in the Communist Party. However, this membership, if it existed, already would have been given in response to question 25 which called for "all" memberships. There is no claim that any of petitioner's groups, listed in response to question 25, is the Communist Party. As the Committee states,

"Since Petitioner admits to a full answer to Question 25, i.e., a full listing of all organizations with which Petitioner has been associated since age 16, *we may lay aside any consideration of the requirement of Rule* [*sic*] *27 that Petitioner tell the Committee whether or not she has ever been a member of the Communist Party.*" Opposition Brief to Petition for Certiorari at 3 (emphasis supplied).

By the Committee's own statement, question 27 has no connection with the Arizona Sedition statute, ARIZ. REV. STAT. ANN. § 13-707(C) (Supp. 1969), which makes it a crime to become ". . . a member of the Communist Party . . . [with] knowledge of said unlawful purpose of said Communist Party. . . ." Hence, the criminal statute to which question 27 pertains, in this case, is the federal Smith Act.

As a matter of jurisdiction, the states and their bar committees have no authority to apply federal criminal statutes particularly when the offense consists of sedition against the United States. Under 18 U.S.C. § 3231, "[t]he district courts of the United States shall have original jurisdiction, *exclusive of the courts of the States,* of all offenses against the laws of the United States." (emphasis supplied). This Court has withdrawn from the states, under *Pennsylvania v. Nelson,* 350 U.S. 497, 504, 76 S. Ct. 477, 481, 100 L. Ed. 640 (1956), all power to prosecute for sedition against the United States since "Congress has intended to occupy the field of sedition." The same policy considerations of uniformity in *Nelson* are applicable where 50 different bar committees might well be applying federal sedition law.

As a practical matter, the elements of the Smith Act membership clause are too difficult to place in the hands of bar committees for application. Such a conviction requires active membership, specific intent, an organization engaged in illegal advocacy and knowledge of the organization's purpose. *Scales v. United States,* 367 U.S. 203, 222, 229, 81 S. Ct. 1469, 1482, 1486, 6 L. Ed. 2d 82 (1961); 18 U.S.C. § 2385 (Supp. 1969). These elements are subtle and "call for strict standards in assessing the adequacy of the proof needed to make out a case of illegal advocacy." *Scales v. United States, supra* 367 U.S. at 232, 81 S. Ct. at 1487-88. As illustrative of why state bar committees should not apply these standards, the Committee in the present case promises to reject on the basis of membership and sincere belief — a far cry from *Scales.*

Seeking out bad moral character because of political affiliation is quite different from basing such a conclusion on burglary, murder, sabotage, and acts which are per se clearly indicative of corruption and lack of integrity. Even the violation of some laws, where political principle has been involved, is not bad moral character. According to *Hallinan v. Committee of Bar Examiners,* 55 Cal. Rptr. 228, 239, 421 P.2d 76, 87 (1966):

"To the extent that acts of civil disobedience involve violations of the law it is altogether necessary and proper that the violators be punished. *But criminal prosecution, not exclusion from the bar, is the appropriate means of punishing such offenders.* The purposes of investigation by the bar into an applicant's moral character should be limited to assurance that, if admitted, he will not obstruct the administration of justice or otherwise act unscrupulously in his capacity as an officer of the court." (emphasis supplied).

This Court has taken a similar view. With respect to the charge that the applicant had violated the Neutrality Act during the Spanish Civil War, this Court in *Schware v. Board of Bar Examiners,* 353 U.S. 232, 242, 77 S. Ct. 752, 758, 1 L. Ed. 2d 796 (1957), said that "[f]rom the facts in the record it is not clear that he was guilty of its violation. *But even if it be assumed that the law was violated, it does not seem that such an offense indicated moral turpitude* — even in 1940. Many persons in this country actively supported the Spanish Loyalist Government." (emphasis supplied). The point was: "In determining whether a person's character is good the nature of the offense which he has committed must be taken into account." *Id.* at 243, 77 S. Ct. at 758.

Federal courts, not state bar committees, should make ultimate decisions of guilt and punishment in this politically sensitive and difficult area, which is exclusively reserved to the federal government. Only after a conviction in federal court could there ever be a rational basis for invoking the severe penalty of exclusion from the bar. Thus, in this case, question 27 can serve no legitimate purpose and a refusal to answer cannot be a rational basis for exclusion.

C. *To Demand That Lawyers Conform to the Political Orthodoxies of the Day is Counterproductive: the Result is a Bar Which Often Abdicates its Duty to Defend Unpopular Causes.*

Questions probing into the beliefs of bar applicants are not necessary to prevent unethical people from practicing law. In-

quiries into the character of applicants can be made of references during the investigation by the bar committee. In every state a prospective lawyer, upon entering the bar, must take an oath of office. In addition, each lawyer is required to maintain certain standards of conduct at the price of possible disbarment. 1 EMERSON, HABER & DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 262 (3d ed. 1967); *see* ARIZ. REV. STAT. ANN. § 32-267 and ARIZ. S. CT. R. 29 (b) (Arizona grounds for disbarment). Beyond these checks, the procedures of criminal law are available to punish unlawful behavior of a lawyer: "The existing means of discovering and punishing illegal or professionally improper conduct, by presenting specific charges and supporting evidence, are ample . . . to meet any danger to our government or disgrace to our profession." *The Proposed Anti-Communist Oath: Opposition Expressed to Association's Policy,* 37 A.B.A.J. 123 (1951).

Question 27 does nothing to accomplish the objective of screening unethical lawyers. It acts as an impediment to the unorthodox applicant and to the applicant who believes that the question violates the Bill of Rights. As a result, the public suffers. Lawyers have a duty to serve the entirety of the public regardless of its individual political views and activities. The profession may be unable to fulfill this duty if the establishment is entitled to weed out of the bar those who, by virtue of their own outlooks, may view with sympathy the legal problems of the anti-establishment minorities.

Lawyers' oaths of a political sort, in addition to restricting the membership in the bar, make less available the services of counsel. As said in a joint statement by 24 lawyers, including former Attorney General Herbert Brownell, Jr., "The establishment of the oath requirement might lessen the freedom of the Bar to accept the responsibility of representing unpopular causes. . . . A lawyer might hesitate to represent accused Communists lest it be said that such representation constituted support of an organization of the prohibited kind." *The Proposed Anti-Communist Oath: Op-*

position Expressed to Association's Policy, 37 A.B.A.J. 123, 125 (1951).

A lawyer must be free to take a case regardless of the politics of his client. As Thomas Erskine said in 1792, "[f]rom the moment that any advocate can be permitted to say that he *will,* or will *not,* stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end." J. CLARK, GREAT SAYINGS BY GREAT LAWYERS 266 (1926).

American legal tradition is resplendent with examples of lawyers who have defended unpopular causes.[14] However, all too often the accused have been deprived of right to counsel because of refusal of lawyers to represent discredited people or unpopular causes. A.B.A. COMM. ON THE BILL OF RIGHTS, 86 A. B.A. REP. 474, 476 (1961). And lawyers who have defended unpopular clients have suffered many types of retribution.[15]

A consequence of attempts at punishment and intimidation is that the right to counsel often is nonexistent. In the words of Mr. Justice Douglas,

> "[f]ear even strikes at lawyers and the bar. Those accused of illegal Communist activity — all presumed innocent, of course, until found guilty — have difficulty getting reputable lawyers

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[14] Andrew Hamilton defended the printer John Peter Zenger who was charged with the crime of publishing criticism of the British Majesty, 1 LEWIS, GREAT AMERICAN LAWYERS 31 (1907); Wendell Wilke defended Communist Party member Schneiderman, *Schneiderman v. United States,* 320 U.S. 118, 119, 63 S. Ct. 1333, 1334, 87 L. Ed. 1796 (1943); Charles Evans Hughes stood up for the rights of ten Socialist Assemblymen expelled from the New York Legislature, O'Brien, *Loyalty Tests and Guilt by Association,* 61 HARV. L. REV. 592, 593-94 (1948); John Adams defended an English Captain charged with giving orders to his soldiers to fire on a group of colonists, 1 J. Q. ADAMS & C. F. ADAMS, LIFE OF JOHN ADAMS 145 (1871); and Roger Taney defended a minister charged with inciting slaves to insurrection, 4 LEWIS, GREAT AMERICAN LAWYERS 91 (1908).

[15] *See* Pollitt, *Counsel for the Unpopular Cause: The "Hazard of Being Undone,"* 43 N.C.L. REV. 9 (1964), for examples of repercussions including contempt charges, loss of practice and other forms of intimidation, taken against lawyers who defended unpopular causes.

to defend them. . . . Some could not volunteer their services, for if they did they would lose clients and their firms would suffer. Others could not volunteer because if they did they would be dubbed 'subversive' by their community and put in the same category as those they would defend. This is a dark tragedy." Douglas, *The Black Silence of Fear,* N. Y. Times, Jan. 13, 1952 (Magazine) 7, 37-38.

This fear is a real thing, and it has practical consequences. As was said by one Washington, D. C. lawyer concerning his refusal to take so-called loyalty cases or even to refer them to other attorneys: ". . . I couldn't take them. They asked me to recommend other lawyers, but I wouldn't be caught dead sending them on to another lawyer — for fear he would think I think he's a Communist, or something. I know that's bad, but most lawyers feel the same way." Pollitt, *Counsel for the Unpopular Cause: The "Hazard of Being Undone,"* 43 N.C.L. REV. 9, 18 (1964) (Quoting from the Washington Daily News, Jan. 14, 1954, at 17, col 2).

In the proposed revision of the Canons of Ethics of the American Bar Association, the Special Committee on Evaluation of Ethical Standards says: "The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and *are able to obtain the services of acceptable legal counsel.*" A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY 11 (Preliminary Draft Jan. 15, 1969) (emphasis supplied). This is indeed an empty platitude if the lawyers who are likely to serve some segments of the community are cut off at the gate. It is vital that these lawyers be permitted to contribute their services, for lawyers perform a very essential function in society. As Mr. Justice Black said:

"Who more nearly appreciates the value of individual freedom than the lawyers of America? . . . Who but lawyers are able to stop at the threshold any of the dangers that come from an invasion of the individual rights upon the theory that this Nation has something to fear by recognizing the

liberty of the individuals? I do not think there is any group in America outside the lawyers who can be expected to preserve the individual liberties about which people speak[:] The liberty of the individual to go to the church of his choice, to belong to the party of his choice, to speak his views, however bad we may think they are. No people but the lawyers, and when they fail, the torch of individual liberty will be carried by nobody else." Black, *The Lawyer and Individual Freedom,* 21 TENN. L. REV. 461, 469 (1950).

V. *The Question and the Decision Below Unconstitutionally Invade Petitioner's Freedom From Self-Incrimination.*

A. *The Privilege Against Self-Incrimination Was Claimed.*

Question 27 reads "Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?" Petitioner refused to answer this question, in part, because of her privilege against self-incrimination.[16] This Fifth Amendment right was claimed in the petition filed with the Arizona Supreme Court and the Committee's response denied this claim. App. 3, 4.

There are two basic reasons for the claim. First, an applicant's answer to question 27 could be "yes." This response would provide a link in the chain of evidence that could lead to prosecution under either the Smith Act, 18 U.S.C. § 2385 (Supp. 1969), or the Arizona Sedition Act, ARIZ. REV. STAT. ANN. § 13-707(C)

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[16] The fact that First Amendment rights also were claimed is immaterial. As said in *Quinn v. United States,* 349 U.S. 155, 163, 75 S. Ct. 668, 673-74, 99 L. Ed. 964 (1955):

"The Government argues, however, that the references to the Fifth Amendment in the instant case were inadequate to invoke the privilege because Fitzpatrick's statements are more reasonably understood as invoking rights under the First Amendment. We find the Government's argument untenable. The mere fact that Fitzpatrick and petitioner also relied on the First Amendment does not preclude their reliance on the Fifth Amendment as well. If a witness urges two constitutional objections to a committee's line of questioning, he is not bound at his peril to choose between them. By pressing both objections, he does not lose a privilege which would have been valid if he had only relied on one."

(Supp. 1969). *Hoffman v. United States,* 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951); *see Quinn v. United States,* 349 U.S. 155, 162, 75 S. Ct. 668, 673, 99 L. Ed. 964 (1955); *Scales v. United States,* 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 82 (1961). Second, given the difficulty of determining whether the applicant's past or present organizations fall within the scope of question 27, the possibility of a perjury charge is a further consideration. *See* ARIZ. REV. STAT. ANN. § 13-561 (Arizona perjury statute); *Cf. Baggett v. Bullitt,* 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964).

B. *Since The Fifth Amendment Protects The Innocent As Well As The Guilty, The Privilege May Be Invoked On The Basis of The Question Alone.*

The privilege against self-incrimination serves as a protection to the innocent as well as to the guilty. *Ullmann v. United States,* 350 U.S. 422, 427, 76 S. Ct. 497, 100 L. Ed. 511 (1956); *Slochower v. Board of Higher Educ.,* 350 U.S. 551, 557-58, 76 S. Ct. 637, 641, 100 L. Ed. 692 (1956). Hence, the claim of the privilege does not hinge on the applicant's answer to question 27. The privilege may be asserted if the question posed calls for a *possible* answer which could tend to be incriminating. Question 27 is not a "neutral" question. A "yes" answer would be incriminating.

A question calling for disclosure of mere association with the Communist Party, without more, presents a sufficient threat of prosecution to support the claim of privilege. *Albertson v. Subversive Activities Control Bd.,* 382 U.S. 70, 77, 86 S. Ct. 194, 198, 15 L. Ed. 2d 165 (1965); *Communist Party v. United States,* 331 F.2d 807, 812-13 (D.C. Cir. 1963). It is only necessary for the proper invocation of the privilege against self-incrimination that "a *possible* answer . . . must have some tendency to incriminate the person to whom the question is addressed." *Emspak v. United States,* 349 U.S. 190, 203, 75 S. Ct. 687, 704, 99 L. Ed. 997 (1955) (Mr. Justice Harlan, dissenting) (emphasis supplied).

To sustain the privilege, it need only be evident from the implications of the question and the setting in which it is asked that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. Proof of any actual hazard to an individual claimant is not required. *Hoffman v. United States,* 341 U.S. 479, 486-87, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951); *Malloy v. Hogan,* 378 U.S. 1, 11-12, 84 S. Ct. 1489, 1495-96, 12 L. Ed. 2d 653 (1964). The Court expressly noted in *United States v. Covington,* ..... U.S. ....., 89 S. Ct. 1559, 1561 (1969), that "[t]he question whether the defendant faced a substantial risk of incrimination is usually one of law which may be resolved without reference to the circumstances of the alleged offense."

As in *Marchetti v. United States,* 390 U.S. 39, 48, 88 S. Ct. 697, 702-03, 19 L. Ed. 2d 889 (1968); *Grosso v. United States,* 390 U.S. 62, 67, 88 S. Ct. 709, 713, 19 L. Ed. 2d 906 (1968); *Haynes v. United States,* 390 U.S. 85, 97, 88 S. Ct. 722, 730, 19 L. Ed. 2d 923 (1968); and *Leary v. United States,* ..... U.S. ....., 89 S. Ct. 1532, 1539 (1969), the claim of privilege as to question 27 is asserted in "an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." *Albertson v. Subversive Activities Control Bd.,* 382 U.S. 70, 79, 86 S. Ct. 194, 199, 15 L. Ed. 2d 165 (1965). Although Congress may find some principles and practices of politics and religion so abhorrent as to warrant criminal liability, "to be placed beyond the pale of the First Amendment is not to be deprived of the Fifth. It is, rather, the very reason for its being." *Communist Party v. United States,* 384 F.2d 957, 968 (D.C. Cir. 1967).

C. *The Privilege Can Be Claimed In A Bar Admission Proceeding.*

The privilege's availability is not limited to the context of criminal trials. In *Application of Gault,* 387 U.S. 1, 49, 87 S. Ct. 1428, 1455, 18 L. Ed. 2d 527 (1967), the Court said that "the

availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory." In *Murphy v. Waterfront Comm'n,* 378 U.S. 52, 94, 84 S. Ct. 1594, 1611, 12 L. Ed. 2d 678 (1964), Mr. Justice White, concurring, wrote that "[t]he privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory. . . ." In short, the claim may be made in the setting of bar admissions. *Cf. Spevack v. Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967).

D. *Exclusion From the Bar May Not Be the Consequence of Claiming the Privilege.*

It is clear that the consequence of Sara Baird's invocation of her Fifth Amendment rights has been exclusion from the bar. This result is not permissible.

The Court in *Spevack v. Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967), held that a lawyer who claimed the Fifth Amendment privilege could not be disbarred for refusing to honor a subpoena duces tecum and for declining to answer questions posed by a bar committee. The same result should occur in a bar admission case, for disbarment and exclusion are essentially the same. As noted by Mr. Justice Harlan, dissenting in *Spevack,* ". . . I can perceive no distinction between 'admission' and 'disbarment' in the rationale of what is now held." *Id.* at 521, 87 S. Ct. at 631. The difference, if any, between exclusion and disbarment is "not of constitutional moment." *Cohen v. Hurley,* 366 U.S. 117, 123, 81 S. Ct. 954, 958, 6 L. Ed. 2d 156 (1961) (overruled by *Spevack v. Klein, supra*).

The basic principle underlying Spevack is that a person should "suffer no penalty" for his silence, and that "[i]n this context 'penalty' is not restricted to fine or imprisonment. It means . . . the imposition of *any sanction* which makes assertion of the

Fifth Amendment privilege 'costly'." *Spevack v. Klein, supra* 385 U.S. at 514-15, 87 S. Ct. at 625 (emphasis supplied). Denial of admission to the bar is just as costly as disbarment and this Court in *Ex parte Garland,* 4 Wall. 333, 377, 18 L. Ed. 366 (1867), recognized that exclusion from the practice is indeed "punishment." In both disbarment and exclusion, the "price for asserting" the privilege is "deprivation of a livelihood." *"Spevack v. Klein, supra* 385 U.S. at 514, 87 S. Ct. at 627.

Sara Baird has been "confronted with Hobson's choice." *Gardner v. Broderick,* 392 U.S. 273, 277, 88 S. Ct. 1913, 1916, 20 L.Ed. 2d 1082 (1968). She has been forced to choose between her Fifth Amendment rights and her legal career.

CONCLUSION

It is respectfully submitted that the decision of the Court below should be reversed and that an order should be entered directing that petitioner be made a member of the Arizona State Bar forthwith.

By: ROBERT H. ALLEN
755 First National
Bank Building
Phoenix, Arizona

JOHN P. FRANK
PAUL G. ULRICH
PETER D. BAIRD
LEVI J. SMITH
114 West Adams Street
Phoenix, Arizona

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